UNITED NATIONAL FINANCE LTD.

v.

INDUSTRIAL RESOURCES BHD.

HIGH COURT, BRUNEI
DENYS ROBERTS CJ
[CIVIL SUIT NO. 70 OF 1985]
27 MARCH 1986

COMMERCIAL LAW: *Estoppel - Negligence - Need to establish duty of care - Breach of duty of care - Practice of finance companies in relation to registration of cars - Car subject of 2 hire purchase agreements - Duty of finance companies to register vehicles the subject of hire-purchase - Bona fide purchaser for value without notice - Whether finance company estopped by negligence from asserting title to car.*

In 1983, L applied to the defendant (a finance company) for the financing of a new car which was to be bought from P, a car dealer. L paid the deposit for the car and two weeks later, L and the defendant entered into a hire-purchase agreement which provided for the payment by L to the defendant of 36 monthly instalments to cover the balance of the purchase price, which was financed by the defendant. In May 1984, L asked the plaintiff to lend him $30,000 on the security of the car and this was achieved by the plaintiff purchasing the car and then rehiring it to L under another hire-purchase agreement. L made two payments under the second agreement after which L, the plaintiff and O entered into a written agreement whereby L assigned all his rights, title and interest under the second agreement to O.

The plaintiff enquired of L as to the blue card (which was proof of registration) and when asked as to why L was not noted as the registered owner of the car, L falsely replied that he was in the process of registering the car in his name. The plaintiff then informed the Land Transport department (LTD) that the car had been let out on hire-purchase terms to L. The plaintiff also told LTD of its claim of ownership in the car and requested LTD to note this fact on the register and on the blue card. In addition, LTD was informed that the plaintiff had hired the car to O. L then defaulted in the payment of his monthly instalments under both agreements and the plaintiff repossessed the car in December. The defendant then learnt of L's default in the 1st agreement and seized the car in February and have retained possession of it ever since. The main issue for the decision of the Court was the question of the ownership of the car. The plaintiff seeks

(a) a declaration that the car is its property;

(b) the return of the car which is in possession of the defendant or its value;

(c) damages for conversion and trespass.

Held:

[1] The legal ownership of the car accrued to the defendant on the purchase of the car by it from P and remained so at the time when L purported to sell it to the plaintiff. It was also clear that L did not sell it under the authority or the consent of the defendant - see *Central Newbury Car Auctions Ltd. v. Unity Finance Ltd.* [1956] 1 QB 371 at 379.

[2] If an owner fails to ensure that his claim of ownership is recorded in the register, he may lose his ownership by virtue of his negligence in omitting to do so, that is, he is estopped by his negligence from asserting his title - *Moorgate Mercantile Co. v Twitchings* [1976] 2 All ER 641 for the application of the doctrine of estoppel by negligence.

[3] Because of the different legislation (s. 4(1) of the Road Traffic Act and Part II of the Road Traffic Regulations) and practice that has been in force in Brunei for 30 years, there is a duty to take reasonable steps to register a claim to the ownership of a motor vehicle. However, it was up to the plaintiff to show that the failure of the defendant to do so was due to the negligence of the defendant or its servants or agents.

[4] Taking into consideration the facts and evidence in the present case, the defendant's duty to take reasonable measures to secure registration was not fulfilled and it was this failure of the defendant which afforded L the opportunity of carrying out his deception.

[5] The owner of a motor vehicle who permits possession and control of it to be passed to another has a duty to take adequate steps to ensure that his claim of ownership is entered on the register within a reasonable time of the creation of his claim. If he fails to do so, he is at risk if a later *bona fide* purchaser for value and without notice of the prior title acquires the vehicle.

[6] The plaintiff was therefore entitled to a declaration that the car has remained its property since 7 May 1984. The defendant is to pay the value of the car as at the date of seizure to the plaintiff. Damages were also awarded to the plaintiff for wrongful detention of the car.

[Costs to plaintiff.]

Cases referred to:
Central Newbury Car Auctions Ltd. v. Unity Finance Ltd. [1956] 1 QB 371
Moorgate Mercantile Co. v. Twitchings [1976] 2 All ER 641

Legislation referred to:
Road Traffic Act [Brunei], ss. 4(1), (2)
Road Traffic Regulations 1956 [Brunei], Reg. 47(2), (5), 48
Sales of Goods Act 1957, s. 21

For the plaintiff - T.C. Chan with Andrew Ong; M/s. Choo Chan & Wong
For the defendant - S.H. Lim; M/s. Susanna Lim & Co.

JUDGMENT

Denys Roberts CJ:

Introduction

The plaintiff, a company carrying on the business of hire-purchase financing for motor vehicles, seeks-

(a) a declaration that a BMW car No. BF 7171 is its property;

(b) the return of the car, which is in the possession of the defendant company, or its value;

(c) damages for conversion and trespass.

Facts

There is a substantial measure of agreement between the parties as to the facts, which I shall set out chronologically, as this is appropriate.

About 6th August, 1983, Martin Loh Nyuk Loi ("Loh") filled in a hire-purchase proposal form, asking the defendant to finance the purchase by him of a new BMW car, then carrying the registration No. KD 25 ("the car").

The car was to be bought from Performance Company Limited ("Performance"), a well-known and reputable firm of car dealers.

The invoice prepared by Performance and dated 6 August 1983, showed a total price of $74,540. Loh paid a deposit of $21,040, leaving a balance of $53,500 due from him to Performance. The invoice was addressed to the defendant "A/c Mr. Loh Nyuk Loi @ Martin".

On 19 August 1983, the defendant's representative and Loh signed a hire-purchase agreement, which provided for the payment of Loh to the defendant of 36 monthly instalments of $1,932.

It is clear beyond argument, and indeed not disputed by the plaintiff, that it was a hire-purchase agreement and not a credit sale agreement. It provided for the bailment of the car to the hirer (Loh) who may not [by cl. 3(c)] assign or transfer the vehicle without the owner's consent in writing. And by cl. 10, the hirer was given a right, when he had made all payments due and discharged all obligations under the agreement, to exercise an option to become owner of the vehicle, "whereupon the vehicle shall become his property but until then the vehicle remains the property of the owner".

From this it follows that legal ownership of the car accrued to the defendant on the purchase of the car by it from Performance and remained so during the term of the hire-purchase agreement.

I accept the evidence of Mr. Wong Kam Sai ("Wong"), the general manager of the defendant company in Brunei, that the defendant's office records suggest that the normal procedure was followed on this occasion, that is to say that the registration of the car with the Registrar of the Land Transport Department ("LTD") was left to Performance to carry out.

What would usually happen was that the dealer would forward the sale invoice and a notification of hire-purchase of the car to the LTD.

The defendant, which financed an average of 150 hire-purchase transactions a month, would send an employee to LTD from time to time to collect the registration book, better known as the "blue card", relating to any new vehicles it had financed.

The LTD was very busy, according to Wong, and there was sometimes a gap of many months between the submission of the documents to LTD and the furnishing of the blue card and the entry of the necessary details in the register.

It is a matter of speculation as to where and why the usual procedure went wrong, but there is no doubt that it did and that the car was not registered in the name of Loh, as the owner, in 1983; nor was a claim of ownership recorded in the register, as would normally have happened, showing the defendant as claiming the ownership of the car.

Loh continued to make his monthly payments during 1983 and up to 28 August 1984, when he owed a balance of $44,300.

The defendant, apart from sending an employee to see if the car's blue card was ready for collection, had taken no further steps to protect their interest in the car.

It was early in May, 1984, that the plaintiff became involved with the car, when Loh asked it to lend him $30,000 on the security of the car. This was to be achieved by the purchase of the car by the plaintiff, which would hire it to Loh under a hire-purchase agreement of the usual kind.

The agreement, dated 7 June 1984, provided for Loh to pay by 12 monthly instalments of $2,750, a total of $33,000. After two payments had been made by Loh, on 18 July, a written assignment was entered between Loh, the plaintiff and Ong Kok Kiong ("Ong"), under which Loh assigned all his rights, title and interest under the principal agreement to Ong.

According to Felix Chong ("Chong"), who was an executive officer in the plaintiff company at the relevant time, Loh produced to him, when he asked for the loan, the blue card relating to the car. That card, which has been produced in evidence, showed not Loh but a Pg. Ismail as the registered owner of the car. The blue card, however, bore no claim of ownership in favour of the defendant, nor indeed of anyone else.

Chong asked Loh how he could use the car as security when he did not own it and was told by Loh that he did own it and that he was taking steps to register it in his own name.

On 4 May, the plaintiff addressed a letter to the LTD, informing it that the car had been let out on hire-purchase terms to Loh and notifying it of its claim of ownership of the vehicle, asking that this be noted "in the register and the registration book". Chong asked Loh to deliver this letter, and the blue card, by hand, to the LTD.

Loh's name was entered on the blue card as owner on 5 May and the ownership claim of the plaintiff was endorsed on the blue card on the same date. The hire-purchase agreement was signed on 7 May.

Chong admitted that he made no enquiries of Pg. Ismail as to whether he has transferred ownership of the car to Loh. All he had to support Loh's assertion to such effect was the blue card.

He said that he knew that the blue card itself bore a warning which reads:

> The person who is in possession of the vehicle may be registered as the owner but he may or may not be the legal owner.

but thought that this merely meant that the owner may be only a hirer, and as the blue card carried no ownership claim, he was not suspicious. He agreed, no doubt with hindsight, that it would have been prudent to check with Pg. Ismail.

However, when the blue card was returned to him on 5 May, with the plaintiff's claim of ownership endorsed therein, this satisfied him that there was no prior claim, because if there had been, the LTD would not have inserted the plaintiff's claim in the blue card.

Chong added:

> "I let the transactions through because of the endorsement of Loh's name on the blue card. That is all that mattered to me. I relied on the blue card as giving our company the legal ownership."

The assignment of 18 July was notified to LTD by the plaintiff on that date by a letter informing it that the car had been let on hire-purchase terms to Ong and asking for the plaintiff's claim to ownership to be registered. The blue card was altered accordingly on 18 August, to show Ong as the owner and to record the ownership claim of the plaintiff on the reassignment to Ong.

Loh made no further monthly payments to the defendant after August. After receiving no reply to their requests for overdue payments, they took steps to repossess the vehicle in December, at first without success.

In January, the defendant learnt that the car had been "double financed" by the plaintiff and that it was in the possession of Ong. One of its officers interviewed Ong and told him that the defendant was the legal owner and wanted to repossess the car.

In spite of the protests of Ong, whom all are agreed was a wholly innocent *bona fide* purchaser for value, the defendant seized the car on 12 February 1984, after correspondence between solicitors for both parties, and have retained possession of it ever since.

It is agreed between the parties that the value of the car, at the date of repossession by the defendant on 12 February 1984, was $38,000; and that the rate of damages for conversion would be $2,820 per month.

Legal issues

This case, to quote Denning LJ in *Central Newbury Car Auctions Ltd. v. Unity Finance Ltd.* [1956] 1 QB 371, at p. 379, "raises the ever recurring question which of two innocent persons is to suffer by the fraud of a third? It is the familiar contest between the original owner who had been delivered into parting with his property and the innocent purchaser who has been deceived into buying it."

The original owner, the defendant, relies on the general principle that the plaintiff cannot acquire ownership of a chattel from someone who has himself no title to it. The innocent purchaser replies that the original owner has been so careless in allowing a rogue to dispose of the property that he may not be heard to deny that rogue's authority to sell it, and that he is precluded by his conduct from denying the rogue's authority to sell within the meaning of s. 21 of the Sale of Goods Act.

The defendant was, without doubt, the owner of the car at the time when Loh purported to sell it to the plaintiff; nor is it in dispute that he did not sell it under the authority or with the consent of the defendant.

The plaintiff is, therefore, obliged to rely on the argument that, if an owner fails to ensure that his claim of ownership is recorded in the register, he may lose his ownership by virtue of his negligence in omitting to do so; in other words, that he is estopped by his negligence from asserting his title.

The majority of the Court of Appeal in the *Newbury case* took the view that it cannot be said that the existence of a blue book in the hands of a seller proves legal ownership, or removes all occasion for enquiry for the purchaser. Indeed the blue card itself contains a clear warning that it does not. It is, therefore, not to be regarded as a document of title.

Estoppel by negligence

The application of the doctrine of estoppel by negligence was considered in detail by the House of Lords, in *Moorgate Mercantile Co. v. Twitchings* [1976] 2 All ER 641.

The plaintiff, a finance company, let a car on hire-purchase to M. The plaintiff was a member of Hire-Purchase Information Limited ("HPI"), an organization to which 98% of the motorcar finance companies in England belonged. It was the practice of members to inform HPI of any hire-purchase agreements entered by them in relation to a motor vehicle.

When a car dealer was offered a vehicle, he would ask HPI if it was the subject of any hire-purchase agreement and would be given the information.

A few months after he had purchased the car on hire-purchase from the plaintiff, M offered the car for sale to the defendant, a car dealer. M falsely informed the defendant that there was no such agreement and that he owned the car. The defendant consulted HPI and was informed by it that the car was not registered with it. The defendant therefore bought it from M and later resold it to Y. The plaintiff discovered this and sued the defendant for damages for conversion.

One of the main contentions of the plaintiff, and it is relevant to this action, was that the plaintiff owed to car dealers, such as the defendant, a duty to provide HPI with information necessary to ensure the registration of any hire-purchase agreement.

By a majority of 3 to 2, the House concluded that the plaintiff was under no legal duty to the defendant to register, or take care to register, the hire-purchase agreement and that the defendant could not plead that the plaintiff was estopped by reason of its negligence from pursuing the claim against it. The negligence consisted in a failure by the plaintiff to post notice of the hire-purchase agreement to HPI.

In a dissenting judgment, Lord Wilberforce came to the conclusion that a finance company which belonged to the HPI scheme was under a duty to take reasonable care to register any hire-purchase agreement to which it is a party; so that if, in reliance on the absence of any registration, a dealer acts to his prejudice, the finance company is estopped from asserting its title against that dealer.

Having found such a duty to exist, he was of the opinion that the failure of the finance company to register the agreement was in breach of it.

Lord Salmon set out the principles which he thought should apply in the following passage at p. 652:

> This kind of estoppel (by negligence) would apply to the present case as follows:
>
> (1) The plaintiffs owed the defendant a duty of care.
>
> (2) In breach of that duty the plaintiffs were negligent.
>
> (3) The plaintiffs' negligence was the real cause of the defendant innocently buying the plaintiffs' car and thereby converting it.
>
> (4) The plaintiffs are therefore precluded from claiming damages against the defendant for the conversion which in reality was caused by their own negligence in failing to register their hire-purchase agreement with HPI who would then have warned the defendant of this agreement and thereby saved him from being defrauded by M.

The majority opinion of the House, however, was that, although it was desirable that finance companies should promptly notify HPI of any new agreement entered into, there was no legal duty imposed upon them to do so.

Lord Fraser expressed the majority view that even if the finance company was careless, in relation to its own property, it is not in breach of any duty to other parties. And that if a duty to register agreements was owed by a finance company, it would have to be a duty to anyone who might make enquiries as to the existence of such agreements, which would include every member of the public. He believed this to be an unjustifiable extension of the concept of the legal duty of care.

Modifications of common law

It was submitted on behalf of the plaintiff that, while I am bound to follow the principles set out in *Moorgate*, it was open to me to find that there is a legal duty to take reasonable care to register a hire-purchase agreement relating to a motor vehicle in Brunei, where there is legislation, dealing with the registration of a claim to ownership, which justifies a departure from the English law.

There is no such legislation in England, though Judges have, on many occasions, suggested that it should be made compulsory for a registration book to record the fact that the vehicle is subject to a hire-purchaser agreement.

Section 4(1) of the Road Traffic Act (Cap. 68) requires the Controller of Land Transport to maintain registers of motor vehicles in such form as may be prescribed. By s. 4(2), a licensing officer **shall**, upon application, and on payment of a prescribed fee, supply to any person a copy of the entries relating to any specified vehicle.

Part II of the Road Traffic Regulations (1956 Subsidiary Regulation p. 402) deals with the registration of motor vehicles.

No vehicle may be driven unless it is registered. Upon registration, a registration book (the blue card) is issued, containing the various particulars set out in Form 2 of the First Schedule to the Road Traffic Regulations, including a column in which shall be entered the "name and address of the registered owner of the Vehicle", though at the foot of the column appears the following wording "The registered owner is the person who keep the vehicle. He may or may not be the legal owner of the vehicle."

Regulation 47(1) is as follows:

> Where the person entitled to the possession of a motor vehicle or trailer is not the absolute owner thereof, but is registered as the owner thereof, any person claiming to be the absolute owner thereof (hereinafter called 'the claimant') may apply to the licensing officer of the district in which the vehicle or trailer is registered to enter his name in the register as the absolute owner in addition to the name of the registered owner.

The licensing officer, subject to the right of the registered owner to object, is obliged (the word "shall" is used) to enter the name of the claimant accordingly.

By reg. 47(5), however, an absolute owner **shall**, on ceasing to be the absolute owner, require the licensing officer to remove his name from the register.

Regulation 48 requires that, on a change of "possession" of a motor vehicle, the registered owner **shall**, within fourteen days, inform the licensing officer in writing of the new owner and the date of change of possession.

The plaintiff contends that these provisions provide, in practice, a system of registration of possession and ownership, including a record of claims to ownership, on which everyone, whether a dealer, finance company or member of the public has come to rely in Brunei, since the register itself is open to the public.

It is conceded that, while many of the other requirements as to registration are mandatory, that that which permits an "absolute owner" (the finance company) to register his claim to ownership is not, unless "may" can be read as meaning "shall". I am sure that it cannot, in the context in which it appears in the regulations.

Since there is no legal obligation to register such a claim, the plaintiff is obliged to contend that because these regulations have been in force for over 30 years and that an expectation has arisen in the community that anyone who has a claim of ownership will register it under reg. 47(2) and that any such claim will be endorsed in the blue card.

Chong's evidence supported this contention. As an experienced company officer, who must have dealt with a large number of applications, he admitted that he only looked at the blue card and did not think it necessary to make any further enquiries as to the ownership of the vehicle.

I am persuaded that any prudent "absolute owner" in Brunei would seek to register his claim; and that he would, or ought, to realize that anyone in Brunei who saw the register or blue card without any claim to ownership endorsed upon it would assume, and in my view reasonably so, that no such claim existed and that the registered owner of the vehicle whose name appeared in the blue card was entitled to deal with it.

Thus I find that in Brunei, by reason of the different legislation and practice in force for 30 years, there is a duty which differs from that which exists in England, namely to take reasonable steps to register a claim to ownership of a motor vehicle.

The mere fact that a claim exists and was not registered, however, is not enough unless the duty to register is an absolute one; and this was not suggested. Thus the plaintiff must show that the failure to register such a claim was due to the negligence of the defendant or its servants or agents.

Wong, the defendant's witness, admitted that it was prudent to register a claim to a car and said that the usual steps seemed, from the company records to have been taken to ensure that this was done; though he was not in Brunei at the time and could not speak from his own knowledge as to what had happened.

The records suggested, he added, that in accordance with normal practice, it had been left to the dealer, Performance in this case, to submit the necessary documents to LTD, for the registration of the car and for the issue of the blue card, which would be collected by one of the defendant's employees.

He insisted that some blue cards were not returned to the finance company for some months due to a backlog of work at the LTD, though he conceded that it would be an unusual case if the card was not returned within a year.

He agreed that the defendant carried out no search of the register during that period and made no effort to check with the Land Transport department about the blue card. He explained that the department did not like such enquiries and that he preferred to wait until the blue card was issued.

He had no reason to be suspicious that anything was wrong, since Loh was continuing to pay his monthly hire instalments until the end of August 1984, after which the defendant did take action when Loh defaulted in payment. He did not think that the defendant had been negligent, as nobody had authority to collect the blue card and there was no reason to suspect the car was subject to a double loan.

Thus the defendant, if Wong's evidence is accepted, and I find him to be truthful and reliable, did initiate the usual procedure to produce the entry in the register of its claim to ownership of the car. It was, therefore, guilty only of inactivity, by reason of its failure to take positive steps to ensure that registration occurred, rather than by any positive act of carelessness.

Nevertheless, negligence can be committed by failure to take the required action as much as by doing what is careless. Not without hesitation, I have come to the conclusion that the defendant's duty to take reasonable measures to secure registration was not fulfilled. It did nothing at all for about nine months before the date of registration of the plaintiff's claim, not even making a specific enquiry at the department about the car's blue card, nor searching the register.

I have still, however, to be satisfied that it was the failure of duty of the defendant which was the cause of the damage caused to the plaintiff.

In August 1983, the defendant had passed to Performance, for use by the latter, when registering the car, a copy of the Performance Invoice, showing Martin Loh as the purchaser of the car. This copy never found its way to the department, which completed the register and blue card on the basis of a different copy of the same invoice when showed Pg. Ismail as the owner from August 1983.

Somehow, and there was no evidence as to this, Martin Loh improperly obtained possession of the blue card from the department and produced it when he approached the plaintiff for a loan in May 1984.

In one sense, therefore, the cause of the plaintiff's loss was the fraudulent conduct of Martin Loh, in obtaining a loan from the plaintiff on the security of the car, which he knew was owned by the defendant.

Nevertheless, it was the failure of the defendant to take proper steps to register its claim which afforded Loh the opportunity of carrying out his deception. If the defendant had made proper enquiries as to the registration of its claim within a reasonable period, Loh would not have been able to deceive the plaintiff, which was in the full sense, an innocent and *bona fide* purchaser for value.

Conclusion

The conclusion which I have reached means that the owner of a motor vehicle, who permits possession and control of it to be passed to another, has a duty to take adequate steps to ensure that his claim of ownership is entered in the register within a reasonable time of the creation of his claim. If he fails to do so, he is at risk if a later *bona fide* purchaser for value and without notice of the prior title acquires the vehicle.

I believe that this is a result which is justified on the basis of established Brunei practice and of the widespread reliance on the register. On general grounds, it is in the interest of the community that such claims ought to be registered, so that deceptions of the kind practised in this case can be more effectively prevented.

It follows that the plaintiff is entitled to a declaration that the BMW motorcar BF 7171 has remained its property since 7 May 1984.

The plaintiff was also entitled to an order that the said car should be returned to it, or that the defendant should pay its value at the date of seizure namely $38,000 to the plaintiff. The latter having informed me, through its Counsel, that it wishes to exercise its option in favour of receiving the money, I award that sum. This leaves it open to the defendant to resume possession of the car and to dispose of it, if it so wishes, subject, of course, to any order to the contrary which might be made in civil suit 298/85.

I also award damages for the wrongful detention of the car, at the agreed rate of $2,820 per month, for the period from the date of seizure by the defendant on 12 February 1985. This seems to be a high figure, but as the parties were agreed on it, I will not seek to interfere with their assessment.

Normally, both the damages and the interest would run from the date of seizure to the date of judgment. However, I think it would be fair to award them only until the time at which the trail would have taken place but for the plaintiff's application in November for a postponement of the trial. I will, therefore, award:

(a) damages at the rate of $2,820 per month from 12 February 1985 to 12 December 1985 i.e. 10 months.

(b) interest for the same period of ten months at 6% on the award of $38,000, the value of the car.

I have not included in the award herein the amount claimed by the plaintiff against a possible claim for refund by the assignee of the car. That was a matter not in issue in these proceedings and no more than a potential liability has been shown.

I was asked to order a stay pending appeal but refused to grant one.

The plaintiff must have costs of the action, to be taxed if not agreed.

Also found at [1986] 2 CLJ 367